MANOHARAN RAMALINGAM v. LIBERTY INSURANCE BHD

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI J
[CIVIL APPEAL NO: WA-12BNCC-23-04-2016]
5 MAY 2017

***INSURANCE**: Policy – Construction of policy – Theft – Insured vehicle stolen – Vehicle last driven and parked by unlicensed driver – Claim for compensation under policy by insured repudiated by insurance company – Whether fact that vehicle driven by unlicensed driver relevant – Whether vehicle stolen due to being driven by unlicensed driver – Whether insured vehicle was in course of being driven or engine was in operation by driver when stolen – Word 'drive' in policy – Proper construction under insurance policy*

The appellant secured an insurance coverage policy from the respondent, an insurance company, for a lorry, concerning third party risks as well as against liability for the loss and damage to the lorry ('the policy'). When the lorry was stolen, the appellant claimed for compensation under the policy but the claim was repudiated by the respondent. The repudiation was made based on the respondent's loss adjuster's report that the appellant's son, who last drove and parked the lorry outside the appellant's house, did not hold a valid driving license at the material time. The appellant's appeals proved futile. This prompted the appellant to commence an action at the Sessions Court to challenge the respondent's repudiation of his claim for compensation under the policy. The Sessions Court Judge ('the SCJ') found, on a balance of probabilities, that (i) the appellant's son was the person who last drove the lorry; and (ii) para. 1 of the general exceptions to the policy, which excepted insurer liability, applied and since the driver of the vehicle, being the appellant's son, was not licensed to drive, the respondent's repudiation of the appellant's claim was justified. Hence, the present appeal. The appellant submitted that the SCJ erred in applying the general exceptions in this case as (i) the finding that the appellant's son was the last person who drove the lorry, even if true, was irrelevant to attract the invocation of para. 1 of general exceptions since the lorry was not stolen due to the same having been driven by the appellant's son; and (ii) applying the usual and ordinary meaning of the word 'drive', as contained in the policy and having regard the general exceptions, the exclusions should not apply as the lorry was not driven by anyone at the time of the theft. The respondent (i) objected to the appellant raising the issue on the true interpretation of the policy as it was submitted that the matter had not been adopted by the appellant at trial or put to the witnesses of the respondent and therefore, the appellant should not be allowed to now pursue a different position taken at the trial ('the objection'); and (ii) argued that since the appellant's son did not hold any valid driving license, para. 1 of the general exceptions applied to repudiate the claim made by the appellant.

Held (allowing appeal with costs):

(1) The objection raised by the respondent was short on substance and without merit. Apart from the issue being the thrust of the grounds set in the memorandum of appeal, the appeal record itself showed that the question on the relevance of the holding of a valid license when the car was not being driven was, in fact, even put to the respondent's witness. In addition to that, the appellant had also, in respect of the proceedings at the Sessions Court, already included in his written submissions that the contention of the issue of who was the last driver of the lorry before it was stolen would be irrelevant to the interpretation of the general exceptions and the policy. (paras 22 & 23)

(2) The true construction of the policy and the general exceptions permit the application of the general exceptions in cases of theft only in a situation where the insured vehicle is in the course of being driven or the engine is in operation by a driver. Therefore, it would not permit repudiation of liability for payment of compensation or admit of a situation where the vehicle is neither being driven not operated by a driver but instead left in the absence of any driver in a stationary state, such as having been parked, like the lorry in the instant case. It could not, by any stretch of the imagination, be stated that the lorry was, when stolen, being driven or under the control of the appellant's son or anyone else for that matter (paras 28, 29 & 32)

(3) By mentioning the word 'drive' in para. 1 of the general exception, the policy made it clear that the exception would only be applicable in the context of loss due to theft if the theft occurs at the time when the vehicle was driven by the person who did not hold a valid license. For instance, this could happen where a car driven by an unlicensed person is stopped by robbers in a remote area who then forcibly dispossessed the driver of the same. Insistence on the construction of general exceptions favoured by the respondent militated against the object of the policy which compensates for loss due to theft and could potentially lead to an absurdity. (paras 39 & 48)

(4) The respondent had not successfully demonstrated the relevance of para. 1 of the general exceptions to the facts of the claim of the appellant for coverage under the policy by reason of the loss of the lorry due to theft. The respondent was therefore not justified in its reliance on para. 1 of the general exceptions to repudiate the claim made by the appellant. The decision of the Sessions Court affirming the repudiation on the same basis could not be sustained. (para 55)

Case(s) referred to:

AXA Affin Assurance Bhd v. Natural Avenue Sdn Bhd [2010] 4 CLJ 84 HC ***(refd)***

Leong Ah Kew & Ors v. Prisma Suria Sdn Bhd [2015] 8 CLJ 300 HC ***(refd)***

Malaysia British Assurance Bhd v. Syarikat Pembenaan Karun Sdn Bhd [2009] 4 CLJ 1 CA ***(refd)***

Malaysia National Insurance Sdn Bhd v. Abdul Aziz Mohamed Daud [1978] 1 LNS 117 FC ***(refd)***
Panglobal Trading Sdn Bhd v. Tokio Marine Insurans (Malaysia) Bhd [2010] 1 LNS 1786 HC ***(refd)***
Rugber Kaur Ajaib Singh v. Ho Shee Fun & Anor [2011] 5 CLJ 159 CA ***(refd)***
Taisho Marine and Fire Insurance (M) Sdn Bhd v. Secure Guards Sdn Bhd. [2000] 1 LNS 142 HC ***(refd)***
Tokio Marine Insurans (Malaysia) Bhd v. WTS Electrical & Engineering Sdn Bhd & Anor [2013] 2 CLJ 595 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 29
Road Transport Act 1987, s. 26(1)

For the appellant - Jeganarth; M/s PS Sohanpal & Sidhu
For the respondent - JS Naicker & G Logananth; M/s Naicker & Assocs

Reported by Najib Tamby

JUDGMENT

Mohd Nazlan Ghazali J:

Introduction

[1] This is an appeal against the decision of the Sessions Court which had, after a full trial, dismissed the claim by the appellant (the plaintiff at the trial) for insurance coverage for theft of vehicle which had been repudiated by the respondent (the defendant in the court below).

[2] At the conclusion of the hearing of the appeal, I allowed the same, gave judgment for the appellant, and pronounced the key reasons for my decision. This judgment contains the full grounds for my decision which focuses on one important aspect of the general exception clause against insurer liability in the event of theft of motor vehicles commonly found in motor vehicle insurance policies.

Key Background Facts

[3] The salient facts, to the extent they are relevant to this appeal, are uncomplicated. The appellant is the owner of a motor lorry rental business, MR Maju Enterprise. The respondent is a licensed insurance company. The appellant secured an insurance coverage from the latter for an Isuzu motor lorry registration number BMH 3056 which had been hire purchased from a banking institution ("the lorry").

[4] The existence of a contractual relationship between the appellant as the insured and the respondent as the insurer in respect of the insurance policy coverage for the lorry with reference KLMB3054117, and in force between 1 October 2013 and 30 September 2014 ("the policy") is not in dispute. Neither is it disputed that the coverage concerned third party risks as well as against liability for the loss of and damage to the lorry.

[5] The lorry was reported stolen on 8 January 2014. The claim for compensation under the policy for the loss of the lorry made by the appellant to the respondent was however repudiated by the latter. The appellant's appeal to the appeals and complaints committee of the respondent was similarly unsuccessful. The respondent's principal reason for the repudiation is attributed to the report of its loss adjuster.

[6] In essence, it was determined by the respondent that the appellant's son, Mr. Tamilvanan was the last person to have driven the lorry and parked the same just outside the house of the appellant. As the appellant's son did not at the material time hold a valid driving license, this thus according to the respondent entitled the respondent to repudiate the policy.

[7] The appellant's suit at the Sessions Court to challenge the respondent's repudiation of the claim for compensation under the policy too was refused. Hence the instant appeal.

Essence Of The Decision Of The Sessions Court

[8] Not an insignificant part of the trial proceedings was concerned with the question of whether the appellant's son was the last person to have driven the lorry before it went missing. It was never in dispute that the appellant's son did not hold a valid driving licence at the material time.

[9] The police report lodged by the appellant's son on the day of the loss (exh. P18) was clear in stating, in Bahasa Malaysia, that he had parked the lorry in front of the appellant's house. This version was also found to be consistent with the Motor Loss Report Form dated 15 January 2014 (exh. P5) produced by the appellant and submitted to the respondent. This was also in congruence with the statements of both the appellant and his son as given to the loss adjuster of the respondent. The Sessions Court also observed that based on his evidence in court, the appellant's son could read and comprehend simple Bahasa Malaysia.

[10] Following repudiation by the respondent on the basis of the appellant's son being the last person to have driven the car and that he did not possess a valid driving licence, the appellant made a police report on 12 August 2014. The purpose was ostentatiously to claim it was in fact he and not his son who last drove and parked the lorry. But the police report was too ambiguous to contradict the earlier report in exh. P18 made by his son. The appellant then wrote a letter to the appeals and complaints committee of the respondent dated 19 August 2014 asserting that it was the appellant himself who last drove the lorry.

[11] The Sessions Court rejected this letter since at trial when questioned during cross-examination, the appellant testified that he could not have written the said letter since he could neither read nor write. Similarly, the Sessions Court found that the appellant's claim that both father and son were forced to make their respective statements to the loss adjuster was not sustainable since this allegation was not pleaded and entirely unsubstantiated.

[12] As such, the Sessions Court found on a balance of probabilities that the appellant's son was the person who last drove the lorry, and then decided that the terms of the general exceptions to the policy which excepted insurer liability applied, since the driver of the vehicle, being the appellant's son, was not licensed to drive, thus justifying repudiation by the respondent of the claim by the appellant.

Principal Grounds Of Appeal By The Appellant

[13] The thrust of the appellant's challenge against the decision of the Sessions Court which was also the only issue raised during the appeal hearing before me is that the trial judge had erroneously applied the general exceptions in the instant case. The crux of the argument of the appellant is that the finding that the appellant's son was the last person to have driven the lorry, even if true, was irrelevant to attract the invocation of the general exceptions since the lorry was not stolen due to the same having been driven by the appellant's son.

[14] The appellant did not therefore deal with the issue of whether or not the appellant's son was the last person to have driven the lorry, a question that had taken much of the arguments at trial. Instead, the appellant in this appeal asserted that applying the usual and ordinary meaning of the word "drive" as contained in the policy and having regard to the general exceptions, the exclusions should not apply as the lorry was not driven by anyone at the time of its theft.

[15] I will next examine this principal issue raised by the appellant, resisted by the respondent, and the arguments and case law authorities advanced by the appellant to support his appeal, and the contentions proffered by the respondent in response, and state my findings on the same. But first, I should reaffirm the important principle concerning appellate intervention.

Law On Appellate Intervention

[16] Whilst under s. 29 of the Courts of Judicature Act 1964, all civil appeals from a subordinate court shall be by way of a rehearing, in hearing this appeal, I am also reminded of the function of this court as established by case law authorities and have therefore proceeded approaching the same accordingly. The trite principle of law that an appellate court should be slow to interfere with the findings of fact of a trial judge cannot be emphasised enough. In particular, I refer to the decision of the Court of Appeal in the case of *Rugber Kaur Ajaib Singh v. Ho Shee Fun & Anor* [2011] 5 CLJ 159; [2011] 1 MLRA 256 where it was stated as follows:

> It was obvious that the learned judge was fully aware of the principle that an appellate tribunal should be slow to interfere with the finding of fact of a trial judge, in this case the Sessions Court judge, more so as he had the advantage of hearing and observing the demeanour of the witnesses before arriving at his conclusion. This well-established principle, which also has common sense written all over it, was clearly at the back of his

mind as he had made mention of the case of *Hussaina Rani Naina Mohamed v. Ahmad Nadzri Kamaruddin & Anor* [1997] 3 CLJ 500 in his grounds of judgment (see also *Yahaya bin Mohamad v. Chin Tuan Nam* [1975] 1 LNS 195; *Tan Chow Soo v. Ratna Ammal* [1967] 1 LNS 178).

Despite the inhibition laid down by the above case, the learned judge still set aside the award of future earnings. Why he did that was merely an affirmation that the above-mentioned inhibition is not absolute. It is the duty of an appeal court, if satisfied or convinced that the trial judge had acted upon principles of law that were wrong, had misapprehended the facts or had made a wholly erroneous conclusion, to reverse the decision (*Tan Kuan Yau v. Suhindrimani Angasamy* [1985] 1 CLJ 429; [1985] CLJ (Rep) 323; *Rasidin bin Partorjo v. Frederick Kiai* [1976] 1 LNS 123). Lindley MR in *Coghlan v. Cumberland* [1898] 1 Ch 704 had occasion to say:

> Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appeal from, but carefully weighing and considering it; and not shirking from overruling it if on a full consideration the court comes to the conclusion that the judgment is wrong.

[17] But the issue in the instant case is less to do with a finding of fact. As is clear from the above pronouncement, whilst interference should be a judiciously measured response by an appellate tribunal, it is equally free from doubt that apart from insufficient judicial evaluation of the evidence, a wrong application of the law is also a well-established basis justifying appellate intervention.

Evaluation And Findings Of This Court

Construction Of Contract Is A Question Of Law

[18] The overarching issue raised in this appeal pertains to the proper interpretation of para. 1 of the general exclusions to the policy. It therefore concerns the construction of a contract. It is as such apposite for me to reaffirm the important role that the law vests in the courts the power to interpret contracts and legal documents.

[19] It is rudimentary that the evidence given by witnesses on the interpretation of such contracts and documents is largely irrelevant if not entirely inconsequential. In *Leong Ah Kew & Ors v. Prisma Suria Sdn Bhd* [2015] 8 CLJ 300, I had said thus:

> [8] Common law has established a number of important principles in the interpretation of contracts, one of which, especially relevant for present purposes is that the construction of contract is a question of law for determination by the court and not by witnesses through their evidence. In *Bahamas International Trust Co Ltd v. Threadgold* [1974] 1 WLR 1514, Lord Diplock stated the following:

> In a case which turns, as this one does, on the construction to be given to a written document, a court called on to construe the document in the absence of any claim to rectification, cannot be bound by any concession made by any of the parties as to what its language means. That is so even in the court before which the concession is made; a *fortiori* in the court to which an appeal from the judgment of the court is brought. The reason is that the construction of a written document is a question of law. It is for the judge to decide for himself what the law is, not to accept it from any or even all the parties to the suit; having so decided it is his duty to apply it to the facts of the case. He would be acting contrary to his judicial oath if he were to determine the case by applying what the parties conceived to be the law, if in his own opinion it were erroneous.
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> [9] This has since been emphatically followed in Malaysian cases, such as in the Court of Appeal decision in *NVJ Menon v. The Great Eastern Life Assurance Company Ltd* [2004] 3 CLJ 96; [2004] 3 MLJ 38.

[20] Therefore, as a case in point, what the litigants testified to be their understanding as to the effect of the various clauses of the documents in contention is of little, if any, consequence to the interpretation of the same. Crucially, since interpretation of the policy is a question of law, an erroneous construction of the same could attract the intervention of an appellate tribunal.

Whether This Is A Valid Issue To Be Raised At The Appeal

[21] At the start of the hearing, the respondent's counsel objected to the appellant raising the issue on the true interpretation of the policy, submitting that the matter had not been adopted by the appellant at trial or put to the witnesses of the respondent. The appellant should therefore not be allowed to now pursue a different position from the one taken at trial.

[22] I however find the objection raised by the respondent to be short on substance. Apart from this issue being the thrust of the grounds set out in the memorandum of appeal, the appeal record itself showed that the question on the relevance of the holding of a valid licence when the car was not being driven was in fact even put to the witness of the respondent, specifically the assistant manager of the motor theft department of the respondent as SD2. Thus p. 138 of the appeal record, being the notes of proceedings, registered the following exchange between the appellant's counsel and SD2:

Peguam Plaintif	:	So that means you do not need a licence when you are not driving?
SD2	:	Sorry, come again.
Peguam Plaintif	:	You need licence to drive?
SD2	:	Of course.
Peguam Plaintif	:	You do not need licence if the lorry is not used, in stationary position?
SD2	:	Of course.

Hakim	:	Your answer.
SD2	:	Agreed.
Peguam Plaintif	:	In the case, the lorry was parked, engine was off and not in use at the time, right?
SD2	:	Yes.

[23] In addition, it is observed that the appellant had also earlier in respect of the proceedings at the court of first instance already included in his written submissions the contention that the issue of who was the last driver of the lorry before it was stolen would be irrelevant to the interpretation of the general exceptions and the policy. This could be seen at p. 89 of the appeal record where the appellant fashioned this argument as "hujahan alternatif" should the trial judge find the appellant's son as the person who last drove the lorry, which the learned Sessions Court Judge eventually did. Accordingly, the objection by the respondent to the appellant raising this issue at the hearing of the appeal is without merit.

The Relevant Clauses In The Policy

[24] A basic term of the policy which is most relevant to this case must be the one that expresses the agreement on the part of the respondent to pay the appellant in the event of the theft of the insured lorry. Section A(1)(f) of the policy stipulates as follows:

Section A – Loss Or Damage To Your Vehicle

1. We will indemnify You if Your Vehicle is damaged or lost in the following circumstances:

…

(f) By burglary, housebreaking or theft.

[25] It should be added that whilst the term 'theft' is not defined in the policy, the High Court in a decision of KC Vohrah J in *Taisho Marine and Fire Insurance (M) Sdn Bhd v. Secure Guards Sdn Bhd* [2000] 1 LNS 142; [2001] 1 AMR 657, had ruled that the term "theft", if not defined in the insurance policy, ought to be construed as it is defined in the Penal Code.

[26] The other pertinent clause is of course the general exceptions to the policy, which is heavily relied on by the respondent as the basis of its repudiation of the claim by the appellant. It is a fairly standard clause found in motor vehicle insurance policies. It reads as follows:

General Exceptions – These Apply To The Whole Policy

We will NOT pay for any liability under the following circumstances:

1. If You or any person with Your consent are not licensed to drive the vehicle except if You or any person with Your consent has held and is not disqualified from holding or obtaining such a licence to drive Your vehicle under any required laws, by-laws and regulations.

[27] At the risk of repetition, it is the key argument of the respondent, accepted by the Sessions Court, that since the appellant's son did not hold any valid driving licence, the above-stated para. 1 of the general exceptions applied to repudiate the claim made by the appellant. The appellant, on the other hand, asserted that the said para. 1 of the general exceptions has no relevance to his claim under the indemnity provisions embodied in s. A(1)(f) of the policy.

Analysis And Decision

[28] Having evaluated the arguments put forth by counsel for the parties, and having examined the appeal record, particularly the policy, and with special emphasis on s. A(1)(f) and the general exceptions, in my judgment, the true construction of the same would permit the application of the general exceptions in cases of theft, like presently, only in situation where the insured vehicle is in the course of being driven or the engine is in operation by a driver.

[29] It would therefore not permit repudiation of liability for payment of compensation or admit of a situation where the vehicle is neither being driven nor operated by a driver but instead left in the absence of any driver, in a stationary state, such as having been parked, like the lorry in the instant case. I arrived at this finding based on the reasons which appear next.

[30] The primary liability for payment of compensation for the loss of the lorry is contained in s. A(1)(f). That much is manifest. The crux of the dispute is whether para. 1 of the general exceptions applied in this case to justify exception to the indemnity to effect insurance pay-out by the respondent insurer to the appellant insured.

[31] The intent and focus of the general exceptions is very clearly to except liability notwithstanding loss or damage to the insured vehicle if the person driving the vehicle is not a holder of a valid driving licence. This is made evident by the reference to the words "licensed to drive the vehicle" contained in para. 1 therein. The word "drive" is not defined in the definitions section of the policy. Perhaps that should not come as a surprise. The meaning is quite plain and obvious. To drive may generally be said to have the same meaning as to operate and control the direction and speed of a motor vehicle. Even the convenient and compact *The Oxford Colour Dictionary & Thesaurus* defines the verb "drive" simply as "to operate (a vehicle) and direct its course".

[32] In the instant case, it was not disputed that the lorry was parked when it was stolen. It cannot by any stretch of imagination be stated that the lorry was, when stolen, being driven or under the control of the appellant's son, or anyone else for that matter.

[33] It is a well-established principle in insurance law, as held by the Federal Court in *Malaysia National Insurance Sdn Bhd v. Abdul Aziz Mohamed Daud* [1978] 1 LNS 117; [1979] 2 MLJ 29 that where there are two or more

A interpretations that could potentially be ascribed to a clause in the insurance policy, the *contra proferentem* rule would apply and the interpretation most favourable to the insured should prevail. In the instant case, there are in fact no other alternative construction to para. 1 of the general exceptions proffered by the respondent, other than highlighting that the word "drive" B as stated earlier is not defined in the policy. That observation does not assist the case of the respondent all the same. But in the absence of a different interpretation, there is no necessity to even resort to invoke the *contra proferentem* rule against the respondent. This is because the meaning of "drive" is crystal clear.

C **[34]** It is also settled law that the burden of proving an exception intended to be relied on by the insurer to disclaim liability is firmly on the insurers. Thus the Federal Court in the same case of *Malaysia National Insurance Sdn Bhd v. Abdul Aziz bin Mohamed Daud* ruled that the insurer in that case failed to prove that an exception clause similar to para. 1 of the general exceptions D in the instant case applied in a situation where at the time of the accident the driver had an expired licence. It was held that the clause envisaged the situation where a person who had been permitted to drive was disqualified from holding a licence by reason of among others, a court order whereas in that case, the expiry of the license and not a court order was the basis of the E absence of a valid licence.

[35] In any event, in the first place it is equally well settled, such as made clear by the Court of Appeal in *Malaysia British Assurance Bhd v. Syarikat Pembenaan Karun Sdn Bhd* [2009] 4 CLJ 1 that the words in an insurance policy ought to be construed according to their plain and ordinary meaning. F The plain and ordinary meaning of "drive" attracts little dispute. This therefore further supports the case of the appellant.

[36] I must add that in the same Court of Appeal decision in *Malaysia British Assurance Bhd v. Syarikat Pembenaan Karun Sdn Bhd*, it was also held that the rule of construction favouring the plain and ordinary meaning is G however subject to the intention of the parties and the object of the insurance policy. Ahmad Maarop JCA (now CJ (Malaya)) thus said:

> [21] That a policy of insurance is basically subject to the same rules of construction as any other written contract is abundantly clear from the authorities. In the words of Hashim Yeop A Sani FJ delivering the judgment H of the Federal Court in *Provincial Insurance Co. Ltd. v. Yee Chee Swee*:
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> > the words used in it must be given their plain, ordinary meaning but in the context of the policy looked at as a whole and subject to any special definition contained in the policy.
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> [22] The rule that the policy, like all other instruments, is to be construed I according to its sense and meaning, as collected from the words used in it, which are to be understood in their plain and ordinary meaning was established as early as in 1803 in *Roberton v. French* [1803] 4 East 130. That the words in the policy is to be understood in their plain, ordinary and popular sense is subject to a number of exceptions, one of which being

> that the context evidently points out that the words must in the particular instance, and in order to effectuate the immediate intention of the parties to the contract, be understood in some other special or peculiar sense. This is clear from the judgment Lord Ellenborough CJ stated in that case: …
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> [23] In construing the policy, the object of the parties is to be steadily borne in mind and the policy must not be construed so as to defeat that object, nor as to render it practically illusory. This was stated by Lindley LJ, delivering the judgment of the English Court of Appeal in *Cornish v. The Accident Insurance Company Ltd*. [1889] QBD Vol. XXIII, 453 …

[37] It is quite manifest from the above judicial pronouncement that the exception to the plain and ordinary meaning approach would only be applicable if the terms in question have acquired a peculiar sense distinct from the popular sense of the same terms, or where the context of the policy suggests that to effectuate the immediate intention of the contracting parties, such terms should be construed and understood in some other special sense.

[38] Again, I fail to appreciate in what possible manner could an interpretation of "drive" as I have described above, and as contended by the appellant could be said to have a different meaning from how this verb is commonly understood or that pursuing such a plain and ordinary meaning of the word would depart from the immediate intention of the parties or diverge from the object of the policy. The policy sought to protect and insure against the loss of and damage to the insured lorry, including as a result of theft.

[39] By mentioning the word "drive" in para. 1 of the general exceptions, again, in my view, the policy makes it clear that the exception would only be applicable in the context of loss due to theft if the theft occurs at the time when the vehicle is being driven by the person who does not hold a valid licence. For instance, this could happen where a car driven by an unlicensed person is stopped by robbers in a remote area who then forcibly dispossessed the driver of the same.

[40] But in the instant case, the lorry was not, when stolen, in the course of being driven in any conceivable sense of the word. It was securely parked, plainly stationary and the crime took place several hours after the lorry was last driven to its parking spot. No liability should therefore attach to the insurer in this situation.

[41] This is consistent with the standard clause in insurance policy against indemnity payment for damage to vehicle attributed to a car accident which was driven by a person not in possession of a valid licence (see for example *Panglobal Trading Sdn Bhd v. Tokio Marine Insurans (Malaysia) Berhad* [2010] 1 LNS 1786; [2010] MLJU 1891). As correctly highlighted by the appellant, it is standard practice, if not very basic, to limit coverage under a motor vehicle policy to a person who possesses a valid licence.

[42] More relevantly, the requirement of the law in respect of the necessity to possess a driving licence is only applicable when the vehicle is being driven. Thus s. 26(1) of the Road Transport Act 1987 states as follows:

> (1) Except as otherwise provided in this Act, no person shall drive a motor vehicle of any class or description, on a road unless he is the holder of a driving licence authorising him to drive a motor vehicle of that class or description, and no person shall employ or permit another person to drive a motor vehicle on the road unless the person so employed or permitted to drive is the holder of such a driving licence.

[43] As such, if at the time it is stolen, the vehicle is not being driven in the sense of not being under the control of a person directing the course of the same, para. 1 of the general exceptions cannot be invoked to qualify s. A(1)(f). In this context, driving could even extend to the situation where the engine is left running although the driver momentarily steps out of the vehicle.

[44] Thus in the High Court decision in *AXA Affin Assurance Bhd v. Natural Avenue Sdn Bhd* [2010] 4 CLJ 84, although the exact issue before the court was different, the net result is that the act of a driver leaving the car with the engine running while he walked across a road to fetch and accompany the children of his employer, but to find the car missing as they walked back towards the direction of the car only a few minutes later contributed towards the rejection of the insurance claim for the loss of the car due to theft. The driver in that case could be said to have been negligent in not ensuring reasonable precaution to safeguard the car from theft.

[45] As the cases involving claims for loss of vehicles due to theft generally show, the question on liability for insurance coverage more commonly turns on the issue of whether the insured has taken all reasonable precautions to safeguard the vehicle from loss or damage. A standard clause to such effect could usually be found in motor vehicle insurance policies, and the policy in the instant case is no exception. In cl. 7 on other matters, it is expressly stated that the policy will only be operative if "you have taken all reasonable precautions to safeguard your vehicle from loss or damage".

[46] However, in the instant case, the issue of whether the appellant had taken all reasonable precautions to prevent loss of the lorry did not arise. When asked at the hearing of this appeal, counsel for the parties both confirmed that the respondent repudiated liability not because of the contention of any failure by the appellant to take reasonable precautions but only by reason of the non-possession of a driving licence by the appellant's son. In any event, based on evidence by the appellant's son, the lorry was parked just outside the house of the appellant by him, and properly secured, including by having the clutch locked.

[47] Thus in *Tokio Marine Insurans (Malaysia) Bhd v. WTS Electrical & Engineering Sdn Bhd & Anor* [2013] 2 CLJ 595, a claim for insurance coverage for loss of two cars by theft succeeded and the High Court affirmed the findings of the Sessions Court that the claimants had taken reasonable

precautions to safeguard the two vehicles from loss and damage. The cars, not unlike the lorry in the instant case, were parked in the storage area of the claimants' compound. They were similarly not stolen whilst being driven. The issue raised by the insurer to repudiate liability in that case was therefore whether the insured had taken reasonable precautions and not whether the last driver was licensed.

[48] In my view, insistence on the construction of para. 1 of the general exceptions favoured by the respondent, where acceptance of policy coverage for theft is predicated on whether the person who last drove the lorry before the loss held a driving licence militates against the object of the policy which compensates for loss due to theft and could potentially lead to an absurdity.

[49] The incongruity is almost unmitigated when the vehicle is so obviously not being driven or in any manner operated by a driver, like in the instant case where the lorry was stolen when it was indisputably stationary, and securely parked. The question on whether the last person who drove the vehicle is properly licensed is clearly in that context wholly irrelevant. It has nothing to do with the subsequent fact of its theft.

[50] The issue of whether there was reasonable precaution could have been material, and the involvement of the appellant's son in this regard as the last person would have been crucial, but as I have stated, this was not an issue in this appeal. Further, if it were otherwise, liability could even be avoided despite the crime having been committed long after the vehicle was last driven by an unlicensed person.

[51] It therefore stands to reason that if reasonable precaution is not an issue, the question of who last drove an insured vehicle is inconsequential. If the contrary interpretation is preferred, and the question of the vehicle being operated by an unlicensed person deemed crucial, the insurer should always examine if a vehicle was ever at any point in time prior to the theft, driven by a person not holding a valid licence; an exercise, the undertaking of which would be no less preposterous. This further unmistakably supports the proposition that the status of the driver in a motor vehicle claim is entirely irrelevant in situations of theft of the vehicle which is not being driven when stolen.

[52] It cannot be emphasised enough that the overarching objective of the policy is to provide insurance coverage to the appellant in the event the lorry is stolen. Paragraph 1 of the general exceptions cannot be stretched to be construed as excepting liability of the insurer whenever it is determined that the lorry had been driven by a person not holding a valid driving licence if the lorry was not being driven when it was stolen. Such a consideration is an outright irrelevance that cannot justifiably premise the repudiation of the claim by the appellant under the policy, more so when the law only makes driving licence a requirement in connection with a motor vehicle that is being driven. Paragraph 1 of the general exceptions has absolutely no application to a situation where the vehicle in question is not being driven.

[53] A proper construction of para. 1 of the general exceptions would entitle the repudiation of coverage by reason of absence of driving licence only if the vehicle is being driven at the time of the theft. In all situations, the primary question would typically and rightfully be whether reasonable precautions had been taken to prevent loss and damage to the vehicle. If the taking of reasonable precautions is not in dispute, there is a patent absence of any nexus between the licensing status (or even the identity) of the driver and the theft of the vehicle.

[54] Accordingly, if insurers like the respondent herein intend to repudiate coverage for theft of vehicles even if they were not being driven at the time the crime was committed, more direct, clear, specific and express terms must be introduced in the policy and other insurance contracts of similar import and purport.

Conclusion

[55] As such, in view of the foregoing analysis, it is my judgment that the respondent has not successfully demonstrated the relevance of para. 1 of the general exceptions to the facts of the claim of the appellant for coverage under the policy by reason of the loss of the lorry due to theft. The respondent was therefore not justified in its reliance on para. 1 of the general exceptions to repudiate the claim made by the appellant. The decision of the Sessions Court affirming the repudiation on the same basis cannot thus be sustained. Accordingly, I reverse the decision of the Sessions Court and allow this appeal, with costs.